

memorandum

CC:TL-N-1380-90

VWATERS

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to: District Counsel, Seattle CC:SEA
Attn: Dean H. Wakayama

from: Senior Technician Reviewer
Tax Shelter Branch CC:TL:TS

██████████ - S Corporation and TEFRA Audit Procedures

TL-N-1380-90

CC:TL:TS Waters Wilson

I.R.C. § 6229

Statute of Limitations

This memorandum is in response to your November 16, 1989, request for tax litigation advice regarding the above-mentioned subject.

ISSUE

Whether a Form 872-S (Consent to Extend the Time to Assess Tax Attributable to Items of an S Corporation) executed by a power of attorney is valid to extend the period of limitations on behalf of all shareholders?

CONCLUSION

Under I.R.C. § 6229(b)(1)(B), the tax matters person may enter into an agreement with the Secretary to extend the period of limitations and such agreement will bind all the shareholders. Since the tax matters person ("TMP") is duly authorized to act for the S corporation in this regard, an attorney-in-fact appointed by the TMP should also be able to execute consents to extend the period of limitations if such authority is given by the TMP. Accordingly, we recommend defense of the period of limitations issue on this basis.

In addition to the TMP, section 6229(b)(1)(B) provides that a consent to extend the period of limitations may be executed on behalf of the S corporation by "any person authorized by the [S corporation] in writing to enter into such an agreement." Temp. Teas. Reg. § 301.6229(b)-1T provides the requirements for such a

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person to extend the statute. We will defend a consent executed by an attorney-in-fact on the basis of Temp. Treas. Reg. § 301.6229(b)-1T only if it substantially complies with the regulations. In this case, the consent does not substantially comply with the regulations and we do not recommend reliance on that argument in defending the period of limitations issue.

FACTS

The Seattle Examination Division is currently examining the Forms 1120S of [REDACTED] for the taxable periods [REDACTED] and [REDACTED]. The returns for these periods were filed on [REDACTED] and [REDACTED], respectively. On [REDACTED], the Spokane Examination Division received a Form 2848 (Power of Attorney) executed by [REDACTED]. This Power of Attorney appointed [REDACTED] and [REDACTED] as attorneys-in-fact for the taxpayer's [REDACTED], [REDACTED], and [REDACTED] corporate 1120S returns.

On [REDACTED], the Examination Division executed a Consent to Extend the Time to Assess Tax Attributable to Items of an S Corporation (Form 872-S) for the taxpayer's [REDACTED] return. This Form 872-S was signed by [REDACTED] and extended the period of limitations to [REDACTED]. Subsequently, on [REDACTED], the Examination Division executed another Form 872-S signed by [REDACTED], which further extended the period of limitations for assessing the taxpayer's [REDACTED] taxes until [REDACTED]. The Examination Division also executed Form 872-S's for the taxpayer's [REDACTED] return on [REDACTED] and [REDACTED]. These forms extended the period of limitations for assessment to [REDACTED] and [REDACTED], respectively.

The S Corporation consisted of [REDACTED] individual shareholders for each taxable period. They were [REDACTED] ([REDACTED]%), [REDACTED] ([REDACTED]%), [REDACTED] ([REDACTED]%) and [REDACTED] ([REDACTED]%).

DISCUSSION

The period of limitations for assessing tax to the shareholders from a change in the treatment of an S corporation item is generally controlled at the S corporation level. Pursuant to I.R.C. § 6244, section 6229(a) applies to the assessment of tax liabilities due to adjustments to S corporation items. The general rule of section 6229(a) is that the period for assessing any tax imposed by subtitle A attributable to S corporation or affected items shall not expire before 3 years after the later of the date the partnership return was filed or the last day for filing such a return.

The period of limitations for assessment under section 6229(a) can be extended by an agreement pursuant to section 6229(b). Section 6229(b) provides:

(1) In general.-The period described in subsection (a) (including an extension period under this subsection may be extended-

(A) with respect to any partner, by an agreement entered into by the Secretary and such partner, and

(B) with respect to all partners, by an agreement entered into by the Secretary and the tax matters [person] (or any other person authorized by the [S corporation] in writing to enter into such an agreement),

before expiration of such period.

Under section 6229(b)(1)(B), the tax matters person may enter into an agreement with the Secretary to extend the period of limitations and such agreement will bind all the shareholders. Since the TMP is duly authorized to act for the S corporation in this regard, an attorney-in-fact appointed by the TMP should be able to execute consents to extend the period of limitations if such authority is given by the TMP.

In this case, [REDACTED], President of [REDACTED], was also the TMP. [REDACTED] and [REDACTED] both held profits interests of [REDACTED]%. [REDACTED] is the TMP of [REDACTED] under the largest profits interest rule of section 6231(a)(7)(B) since his name appears first in the alphabet. See Temp. Treas. Reg. § 301.6231(a)(7)-1T(m)(2).

The Form 2848 (Power of Attorney) signed by [REDACTED] designated [REDACTED] as attorney-in-fact. A power of attorney includes the power to extend periods of limitations unless specifically excepted. See Treas. Reg. § 601.502(c)(1)(iii). The Form 2848 signed by [REDACTED] did not exclude the authority to execute consents. Since section 6229(b)(1)(B) authorizes a TMP to execute consents to extend the period of limitations on behalf of the S corporation, [REDACTED], in his capacity as the TMP of [REDACTED], was authorized to execute the Form 2848 and delegate his power to the attorney-in-fact. That is, since the Form 2848 was executed by the TMP, the form can be viewed as delegating the TMP's authority to extend the period of limitations with respect to all of the shareholders in the S corporation. This interpretation is not free from doubt since the TMP is a creature of federal statute, and, as such, it

remains unclear as to whether his authority may be delegated.¹ However, we recommend defense of the two Forms 872-S executed by [REDACTED] as the attorney-in-fact. We note that this position would be stronger if [REDACTED] had noted on the Form 2848 that he was signing as TMP rather than merely as president of [REDACTED]. Nevertheless, since he was, in fact, the TMP we believe the validity of the Forms 872-S should be defended.

In support of this conclusion, we believe the TEFRA provisions contemplate that the authority of the TMP may be delegated. Otherwise, the TMP could not, for example, unilaterally retain the services of an attorney to fulfill his statutory authority to file petitions and/or litigate partnership actions on the TMP's behalf. Nor could the TMP hire an attorney or accountant to represent the partnership in the audit process. We do not believe that Congress, in enacting the TEFRA provisions, intended to tie the hands of the TMP with respect to delegating his authority to represent the interests of the S corporation.

In addition to the TMP, section 6229(b)(1)(B) provides that a consent to extend the period of limitations may be executed on behalf of the S corporation by "any person authorized by the [S corporation] in writing to enter into such an agreement." Temp. Treas. Reg. § 301.6229(b)-1T, as applied to S corporations by section 6244, provides the requirements for such a person to extend the statute. The S corporation must file a statement with the service center with which the corporate return is filed. The statement must: (1) provide that it is an authorization for a person other than the tax matters person to extend the assessment period with respect to all shareholders; (2) identify the S corporation and person being authorized by name, address and taxable year or years for which the authorization is effective; and (4) be signed by all persons who were shareholders at any time during the year or years for which the authorization is effective.

A delegation by all shareholders in strict compliance with the above regulation which specifically deals with TEFRA partnership statute extension authority will unquestionably be valid. A delegation which substantially complies with the regulations may also constitute a valid designation. In Taylor v. Commissioner, 67 T.C. 1071, 1077-78 (1977), the court set forth the criteria for substantial compliance:

¹ This issue is pending before the Tax Court in Amesbury Apartments Ltd. v. Commissioner, Docket Nos. 16044 and 22252-88, an authorized test case.

The critical question to be answered is whether the requirements relate "to the substance or essence of the statute." . . . If so, strict adherence to all statutory and regulatory requirements is a precondition to an effective election. . . . On the other hand, if the requirements are procedural or directory in that they are not of the essence of the thing to be done but are given with a view of the orderly conduct of business, they may be fulfilled by substantial, if not strict compliance (citations omitted).

We conclude that the requirement of Temp. Treas. Reg. § 301.6229(b)-1T(d) for signature by all shareholders is a substantive, rather than a procedural, requirement. At a minimum, a delegation of statute extension power pursuant to that regulation should be signed by all the shareholders for the years for which the authorization is effective, and identify the corporate years for which it is effective. While the Form 2848 reflects the S corporation taxable years to which the form applies, it was not signed by all the shareholders of [REDACTED] as required by Temp. Treas. Reg. § 301.6229(b)-1T(d). Under a substantial compliance standard, it is doubtful that a Form 2848 signed by only one of [REDACTED] shareholders would be deemed to satisfy the regulation.² Therefore, we do not believe that [REDACTED] was "authorized" by the S corporation within the meaning of Temp. Treas. Reg. § 301.6229(b)-1T to execute the two consents to extend the period of limitations on behalf of the S corporation.

Finally, we are aware that Treas. Reg. § 601.504(b)(1)(iv) provides that, in the case of a corporation, a power of attorney may be executed by an officer having authority to bind the corporation, who shall certify that he or she has such authority. In this case the Form 2848 was signed by the president of [REDACTED] who certified that he had authority to execute it on behalf of the corporation. Consequently, it can be argued that the Form 2848 validly authorized [REDACTED] to extend the period of limitations since it satisfied the requirements of section 601.504(b)(1)(iv). However, substantial hazards exist with respect to that argument. That regulation was promulgated prior to the enactment of the TEFRA provisions. Section 301.6229(b)-1T of the TEFRA regulations subsequently provided more specific requirements for authorizing a person other than the TMP to extend the period of limitations at the S corporation level. We believe section 301.6229(b)-1T should be given

² We note that this issue is also pending before the Tax Court in Amesbury Apartments Ltd.

precedence in TEFRA proceedings over section 601.504(b)(1)(iv). Consequently, we do not recommend reliance on section 601.504(b)(1)(iv) to defend the period of limitations issue.

If you have any questions regarding this matter, please contact Vada Waters at (FTS) 566-3289.


CURTIS G. WILSON